84-1894 (1)

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MAY 29 1985
ALEXANDER L. STEVAS,
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

RONALD LEE SADE,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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34 pgs

QUESTION PRESENTED

Whether the Due Process Clause is violated when the accused enters a guilty plea on the express condition he will be permitted to argue sufficiency of the evidence issues on appeal, yet the law of the state does not permit such argument.

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OPINION BELOW

On April 3, 1985, the California Supreme Court denied petitioner's Petition for Hearing in case number AO22288 without an opinion. (Appendix A.)

The lower court's decision on the issue raised was rendered without opinion and these summary denials also appear in the Appendix. (Appendix B.)

The opinion of the California Court of Appeal, not for publication, appears in

the Appendix hereto. (Appendix C.)

JURISDICTION

The judgment of the California Court of Appeal was filed on January 23, 1985. The motion at issue here had been earlier denied by that court on May 3 and May 30, 1984. A timely filed Petition for Hearing in the California Supreme Court was denied on April 3, 1985. This Petition for Writ of Certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

California Penal Code §1237.5

> "No appeal shall be taken by defendant from a judgment of conviction upon a plea of guilty of nolo contendere, or a revocation of probation following an admission of violation, except where
>
> (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings; and

(b) The trial court has executed and filed a certificate of probable cause for such appeal with the county clerk."

STATEMENT OF THE CASE

As a condition of his guilty plea to various narcotics offenses, Mr. Sade was promised that a certificate of probable cause would issue preserving all matters raised in pre-plea motions for appeal. Plea Transcript (Proceedings of January 3, 1983) at 3:19-21, hereinafter PT. The trial court signed such a certificate purporting to preserve the dismissal issues for appeal. Clerk's Transcript at 982, hereinafter CT. The issues raised in petitioner's dismissal motion involved sufficiency of the evidence. CT. 833-839.

Pursuant to the authority of People vs. Geitner (1982) 139 Cal.App.3d 252, appellate counsel submitted to the California Court of Appeal a Motion for Summary Reversal along with the opening brief. The motion was denied without comment. (See Appendix B.)

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be granted. The petitioner's guilty plea was specifically induced by a promise that he would have the right to bail pending appeal and that he would be able to appeal the denial of his Motion to Dismiss (Calif. Penal Code §995). The judge signed a certificate of probable cause because he believed the petitioner would be able to appeal the denial of this motion as outlined in the plea bargain.

Petitioner was not able to appeal the denial of his motion reviewing the sufficiency of the evidence. Therefore, he has been denied the benefit of his plea bargain and should be allowed to withdraw his guilty plea.

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ARGUMENT

I

THE DECISION BELOW CONFLICTS WITH SANTOBELLO VS. NEW YORK (1971) 404 U.S. 257 AND OTHER DECISIONS OF THIS COURT INVOLVING GUILTY PLEAS

In Santobello vs. New York (1971) 404 U.S. 257 this court held that where a prosecutor fails to keep promises made to an accused at the time of his guilty plea, the Due Process Clause is violated whether or not the prosecutor's conduct was inadvertent. 404 U.S. 262-263. See also Blackledge vs. Allison (1977) 431 U.S. 63 (where state prisoner sought habeas corpus relief on grounds his guilty plea was induced by an unkept promise, he was entitled to some type of hearing in district court); Brady vs. United States (1970) 397 U.S. 742, 755 (stating applicable standard for judgment voluntariness of plea).

Here the trial judge kept his promise to sign a certificate of probable cause for petitioner's appeal, CT. 982, but the court was apparently unaware that it was

impossible for it to preserve dismissal issues going to sufficiency of the evidence by this or any other method. See, e.g., People vs. Kaanehe (1977) 19 Cal.3d 1, 9; People vs. DeVaughn (1977) 18 Cal.3d 889, 896 (guilty plea waives all sufficiency issues). Thus, it is indisputable on this record that petitioner's plea was fundamentally defective by the Brady, supra, standard. Although the trial court's error was probably inadvertent, pursuant to Santobello, supra, petitioner is entitled to relief. The failure of the lower state courts to grant relief, or even to comment on the issue, in the face of explicit authority mandating remand for withdrawal of plea, People vs. Geitner (1982) 139 Cal.App.3d 252, is inexplicable. Whatever the reason, it is clear the state courts have failed to follow the Constitution as interpreted by this Court, and the Court should exercise its discretion to correct this fundamental error.

/

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CONCLUSION

Counsel respectfully submit a Writ of Certiorari should issue to review the decision of the California Court of Appeal summarily denying petitioner's request for reversal.

Respectfully Submitted,

VICTOR D. VERTNER
Attorney for Petitioner

VDV:ps

5/10/85

APPENDIX A

CLERK'S OFFICE, SUPREME COURT

4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

Apr - 3 1985

I have this day filed Order:

HEARING DENIED

In re: _____ No. A022288

PEOPLE

vs.

RONALD LEE SADE

Respectfully,

Clerk

APPENDIX B

Court of Appeal of the State of California
IN AND FOR THE
First Appellate District
Division One

COPY

People of the State of California,	)	F I L E D
	)	May 3, 1984
	)	Court of Appeal-
Plaintiff and Respondent,	)	First App. Dist.
	)	CLIFFORD C. PORTER,
vs.	)	Clerk
	)	No. A022288
Ronald Lee Sade, et al.,	)	
	)	Santa Clara
Defendants and Appellants.	)	Superior
	)	Court No. 84067

BY THE COURT:

Appellant's motion for summary reversal is denied.

Dated: May 3, 1984

/s/ ELKINGTON, J. Acting P.J.

Court of Appeal of the State of California
IN AND FOR THE
First Appellate District
Division One

COPY

F I L E D
May 30, 1984
Court of Appeal-
First App. Dist.
CLIFFORD C. PORTER,
Clerk

People of the State of California,	)	
Plaintiff and Respondent,	)	
vs.	)	No. A022288
Ronald Lee Sade, et al.,	)	Santa Clara Superior Court
Defendants and Appellants.	)	No. 82586/84067

BY THE COURT:

This court's order of May 3, 1984 denying appellant's motion for summary reversal is amended to reflect the addition of Santa Clara Superior Court Action No. 82586.

Dated May 30 1984

/s/ RACANELLI, P.J.
P.J.

APPENDIX C

NOT TO BE PUBLISHED
IN OFFICIAL REPORTS

COPY

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

F I L E D
Jan. 23, 1985
Court of Appeal-
First App. Dist.
CLIFFORD C. PORTER,
Clerk

THE PEOPLE,	(AO22288)
Plaintiff and Respondent	(Sup. Ct. Nos. 82586, 84067)
v.	
RONALD LEE SADE and LORYNN CLAIRE SADE,	
Defendants and Appellants.	

Appellants appeal their convictions of various drug-related offenses.

The judgments are affirmed.

Procedural History

On March 15, 1982, Information No. 82586 was filed in Santa Clara County Superior Court charging appellant Ronald Lee Sade and two codefendants who are not parties to this appeal with violations of Penal Code section 182 (conspiracy) and Health and Safety Code section 11352 (sale of controlled substances). Ronald was also charged with a misdemeanor

violation of Penal Code section 12031, subdivision (a) (loaded weapon in vehicle in public).

On July 6, 1982, Information No. 84067 was filed in Santa Clara County Superior Court charging both Ronald and his wife, appellant Lorynn Sade, with violations of Health and Safety Code sections 11351 and 11378 (possession of controlled substances for sale) and misdemeanor violations of Business and Professions Code section 4143, subdivision (a) (possession of hypodermic). Both entered pleas of not guilty to this information. The People's motion to consolidate the two informations was granted.

Thereafter Ronald and Lorynn filed a motion to suppress pursuant to Penal Code section 1538.5. The motion was heard and later denied.

On January 3, 1983, Ronald and Lorynn changed their pleas to the informations to guilty. On February 25, 1983, Lorynn was placed on formal probation for a

period of two years on condition she serve four months in county jail and pay fines totaling $320. Her sentence was stayed pending appeal, and she was released on her own recognizance. On April 21, 1983, Ronald was sentenced to five years in state prison and released on bail pending appeal.

Both Ronald and Lorynn thereafter filed notices of appeals now before us.

Issues

Appellants challenge the lawfulness of a search and seizure of evidence, conducted pursuant to a warrant. They contend that the People failed to meet their burden to justify the search and seizure by failing to introduce the search warrant at the de novo hearing and that the search warrant should have been quashed due to material omissions.

Failure to Introduce Search Warrant at de novo Hearing

The search warrant was marked as Exhibit D for identification at the preliminary examination, the court rejected the motion to suppress. Exhibit D, the warrant, was

returned to the defense. It appears that the warrant was not introduced into evidence at the de novo hearing on appellants' motion to suppress in the superior court, but, rather, that the transcript of the preliminary examination was introduced as evidence.

Since it was never introduced into evidence, the search warrant is not part of the record before us. On September 23, 1983, appellants filed a motion to augment the record on appeal with the warrant. The motion was granted on October 3, 1983. The Santa Clara County Clerk filed with this court on January 5, 1984, a certificate which stated, in relevant part: "PLEASE! TAKE JUDICIAL NOTICE THAT ON THE ABOVE CASE AUGMENTATION IS COMPLETE. OUR RECORDS SHOW THAT A SEARCH WARRANT THAT COUNSEL HAS REQUESTED WAS RELEASED TO INVESTIGATING OFFICER AT THE PRELIM BEFORE JUDGE ROBERT M. FOLEY, WHO IS NOW A SUPERIOR COURT JUDGE. HEARING WAS ON 5/14/83."[1/]

Appellants argue that since the warrant was not introduced into evidence, the prosecution failed to meet its burden. Appellants make a hyper-technical argument. The cases they cite, which impose the burden on the People to justify searches or seizures from an accused's home, are cases involving warrantless searches.[2/]

When a search is pursuant to a warrant, the burden of establishing the illegality of the search is on the party challenging the search. (See Skelton v. Superior Court (1969) 1 Cal.3d 144, 154-155, fn. 8. See also Badillo v. Superior Court, supra, 46 Cal.2d 269, 272.)

Appellants seem to argue that, since the warrant was not introduced in evidence at the superior court hearing, the burden to justify the search should be imposed on the prosecution, as if the search had been conducted without a warrant. This argument seems to propose an absurd result which would advance no discernible public policy.

Appellants contend also that this court may not consider evidence not presented at the de novo hearing (People v. Wright (1977) 72 Cal.App.3d 328, 344). But the evidence at the superior court hearing did include the transcript of the preliminary examination, at which the warrant was discussed and marked for identification, and there is no dispute that court and counsel treated the search question in the context of the existence of a warrant. Although the warrant itself is not part of the record, the testimonial evidence without contradiction demonstrates that the search was incident to the warrant. The burden, therefore, is on appellants to prove illegality of the search and seizure.

Appellants further contend that "even if it were possible for this Court to overlook these serious errors, this appeal cannot be litigated without the search warrants in the record. An appellant is constitutionally guaranteed 'a "record of sufficient completeness" to permit proper

consideration of [his] claims.' Draper v. Washington(1963), 372 U.S. 487,499; Mayer v. City of Chicago(1971), 404 U.S. 189,194. Clearly, this Court cannot review appellants' claims regarding the search warrants without having them to read. Cf. Kaylor v. Superior Court(1980), 108 C.A.3d 451,457 (where affidavit was illegible, magistrate's review was impossible). Yet it is improper for this Court to read them since they were not made part of the record below. Reversal is warranted on this ground alone."

We conclude, however, that inasmuch as the burden was on appellants to demonstrate the illegality of the search, it is the responsibility of the defense to assure that the warrant, in its possession since July 1, 1982, was made part of the record. We further conclude that the present record is sufficiently clear and explicit as to what the warrant contained for us to conclude that, under the circumstances described, there was no error.

Appellants attempt to draw an analogy to People v. Cagle (1971) w1 Cal.App.3d 57, by arguing that "[T]here, neither the minutes nor the transcript disclosed a stipulation that the preliminary hearing transcript was before the superior court on the suppression motion. References to the transcript were made by both sides at the suppression hearing and in their written points and authorities. From this, the Court of Appeal could have inferred that the preliminary transcript was properly before the superior court. The reviewing court found that it was not required to draw such an inference and concluded emphatically that 'the possibility of [such inferences] should not be relied on by trial courts or attorneys as a substitute for sound practice.' 21 C.A. 3d at 61."

The analogy is flawed. Cagle simply holds that we are not required to draw certain inferences, not that we are precluded from so doing.

Alleged Material Omissions from Search Warrant

The affidavit in support of the warrant was based on events occurring on September 1, 1981, which were revealed in the testimony given at the motion to suppress evidence. On that day, Officer Ronald Brooks of the Redwood City Police Department was working as an undercover narcotics officer. He made arrangements to purchase one quarter of an ounce of cocaine. As a result, he met with Judy Taboada and Gloria Majit at a Sunnyvale address. He gave Taboada $780. She drove away, going to 5379 Ayrshire in San Jose. There she met with appellant Ronald Lee Sade, an unidentified male wearing an orange T-shirt, and a female.

A while after Taboada left the Sunnyvale house, Majit received a telephone call. She ended the conversation by saying "'fine, we'll be there.'" She then told Brooks that Taboada had just left her "connection" and wanted them to meet her in one half hour.

At 7:55 p.m., Taboada drove from the Ayrshire residence back to Sunnyvale. She went to the parking lot of a supermarket and there met with Brooks, Majit, and a confidential informant. She gave Brooks a plastic bag containing approximately six grams of white powder containing cocaine.

At all or substantially all times Taboada was under surveillance by a team of police officers.

On September 4, 1981, a similar set of events took place, which also resulted in a purchase by Brooks of cocaine. On September 9, 1981, Brooks made arrangements to purchase a pound of cocaine. The events of September 9, 1981, culminated in the arrest of Ronald and a search, pursuant to the warrant, which produced the evidence which was the basis for the charges made against appellants.

Appellants contend the warrant should have been quashed due to omissions from the affidavit of material facts. There were, say appellants, essentially three such omissions.

First, "Brooks swore that Sgt. Keech of Santa Clara Police 'maintained constant surveillance with the seller as she drove to the presumed pick-up point and from that point to the delivery point.' . . . [E]mphasis added. However, Sgt. Keech acknowledged in testimony that there had been breaks in the surveillance. . . .

"Secondly, Brooks swore that Keech told him the seller had been seen entering the house at 5379 Ayrshire Drive. . . . Keech testified that hedges made it impossible to see the front of the house and that he did not actually see anyone enter the house. . . . Later he swore that surveillance of the front door would have been possible, but imprudent under the circumstances. . . ."

The third omission, according to appellants, relates to the "orange man": "[¶] Sgt. Keech's report discusses . . . a man in an orange T-shirt who was seen to leave 5379 Ayrshire while the surveillance officers were waiting for the seller to come

out. . . . Although the 'orange man' was a suspect, . . . the officers never found out who he was, . . . and the affidavit does not report his presence."

The People reply to the allegation that the affidavit's reference to constant surveillance was false by noting that surveillance was done by a team of officers which was rotated in order to avoid detection. On occasion, the surveying officer might lose visual contact momentarily.

The trial court found that the affidavit's failure to mention surveillance breaks "cannot be said to substantially interfere with the magistrate's inference-drawing process." The court found the omissions were merely negligent, not intentional.

As to the accuracy of the statement in the affidavit that Taboada was seen entering the Ayrshire residence, The People note that the affidavit does not state that she entered the residence via the front door. The officer testified that he saw her walk

towards the attached garage, the door of which was open. The trial court concluded that "it was a reasonable, logical and valid conclusion that the suspects entered the residence."

Finally, the People suggest that appellants' speculation that the "orange man" may have been a "bag man" who delivered narcotics and thus was an uninvestigated source of narcotics is flawed: "[T]his was a search warrant for the Ayrshire residence, not an arrest warrant for particular persons. Evidence that yet another possible supplier brought contraband to the Ayrshire residence would only enhance probable cause to search the residence. Such evidence could not defeat probable cause to search the residence . . . ."

The trial court determined that "there is no evidence that [the orange man] was connected in anyway [sic] with this case. Even if we speculate that he was a possible participant this does not dispel the existence of probable cause that evidence would be found at the Ayrshire residence."

A search conducted pursuant to a warrant is presumed valid. (Skelton v. Superior Court, supra, 1 Cal.3d 144, 154-155, fn. 8.) The party challenging the warrant affidavit has the burden to prove any omissions were material or intended to mislead the magistrate or made in reckless disregard of the truth. (People v. Kurland (1980) 28 Cal.3d 376, 390, cert. den. (1981) 451 U.S. 987.) The trial court's ruling on the suppression motion necessarily implies a finding that the omissions in question were the product of neither recklessness nor an intent to mislead. The trial court's ruling on the suppression motion is presumed correct and must be upheld if supported by substantial evidence. (People v. Lawler (1973) 9 Cal.3d 156, 160.) Based on the foregoing standard, we conclude that the trial court's ruling should be upheld.

* * *

The judgments are affirmed.

Holmdahl, J.

WE CONCUR:

Racanelli, P.J.

Elkington, J.

FOOTNOTES

1/ The reference to a "5/14/83" hearing date is an obvious typographical error; the correct date is 5/14/82. That May 14, 1982, hearing, of course, preceded the continued hearing on July 1, 1982. At that time the warrant was returned to the defense as shown by the record of the July 1, 1982, hearing and not denied by appellants.

2/ Appellants cite Badillo v. Superior Court (1956) 46 Cal.2d 269, 272, Payton v. New York (1980) 445 U.S. 573, 586 and People v. Ramey (1976) 16 Cal.3d 263, 275-276, cert. den. (1976) 429 U.S. 929.